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IN THE
COURT OF APPEALS OF INDIANA

RICHARD S. OLDFIELD, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 69A01-0702-CR-74
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl Taul, Judge
Cause No. 69C01-0504-FB-006

OCTOBER 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Richard S. Oldfield, Jr. appeals his sentences for his convictions of two counts of battery with a deadly weapon as Class C felonies. Ind. Code § 35-42-2-1(a)(3).

We reverse and remand for resentencing consistent with this opinion.

Oldfield presents one issue for our review: whether the trial court erred in sentencing him.

On April 9, 2005, Oldfield and a few friends were involved in an altercation with a group of people that included Andrew Matthews and Blake Eyler. At one point during the brawl, Oldfield obtained a knife, which he used to stab both Matthews and Eyler. Based upon this incident, Oldfield was charged with two counts of aggravated battery as Class B felonies and two counts of battery with a deadly weapon as Class C felonies. Oldfield entered a plea of guilty to two counts of battery with a deadly weapon and was sentenced to consecutive terms of six years with two years suspended on each count.

In this appeal, Oldfield raises several issues regarding his sentences. Because Oldfield committed these offenses prior to the effective date of the legislature's amendments to our statutory scheme for felony sentencing, we apply the statutes that were in effect at the time of commission of these offenses and the applicable caselaw.[1]

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[1] On April 25, 2005, just after Oldfield's commission of the instant offenses, statutory amendments took effect whereby the legislature amended the state sentencing scheme to provide for "advisory" sentences rather than "presumptive" sentences. These amendments constitute a substantive change in a penal statute and, therefore, may not be applied retroactively. *See Combs v. State*, 851 N.E.2d 1053, 1066 n.8 (Ind. Ct. App. 2006), *trans. denied*, 860 N.E.2d 595. Thus, in the present case, we are required to apply the prior "presumptive" sentencing scheme.

Oldfield first contends that the trial court erred in its determination of aggravating and mitigating circumstances. Specifically, he argues that the trial court relied upon improper aggravating factors in determining his sentence and failed to find certain mitigating factors that were supported by the evidence.

Sentencing is a determination within the sound discretion of the trial court, and we will not reverse the trial court's decision absent an abuse of discretion. *Allen v. State*, 722 N.E.2d 1246, 1250 (Ind. Ct. App. 2000). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances of the case. *Groves v. State*, 823 N.E.2d 1229, 1231 (Ind. Ct. App. 2005). The broad discretion of the trial court includes whether to increase the presumptive sentence, to impose consecutive sentences, or both. *Jones v. State*, 807 N.E.2d 58, 68-69 (Ind. Ct. App. 2004), *trans. denied*, 822 N.E.2d 969.

Oldfield claims error with the trial court's use of his criminal history as an aggravating factor. Whether and to what extent a sentence should be enhanced based upon an individual's criminal history hinges on the weight of that history. *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006). "This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." *Id*.

Oldfield's criminal history consists of one juvenile adjudication for actions that would constitute the offense of disorderly conduct, a Class B misdemeanor, if committed by an adult. This charge was filed when Oldfield refused to obey his mother and pushed

away from her, causing her to fall. For this adjudication, Oldfield was placed on probation. However, Oldfield was found to have violated his probation twice, one of which was due to a failed drug screen.

In evaluating the significance of Oldfield's criminal history as an aggravating circumstance, we note that his pushing of his mother is tenuously related to the nature of this case as far as violence toward other people. Although the instant offenses occurred less than a year after Oldfield's release from his probation, the gravity of the prior juvenile offense is far outweighed by the current offenses, and the prior juvenile offense was not committed while armed. Therefore, we conclude that Oldfield's criminal history cannot be considered a significant aggravator in the context of a sentence for battery with a deadly weapon. *See Walsman v. State*, 855 N.E.2d 645, 653 (Ind. Ct. App. 2006), *reh'g denied* (determining that defendant's criminal history of conviction for operating a vehicle while intoxicated, as a Class C misdemeanor, and juvenile adjudications for incorrigibility and unlawful possession of legend drug could not be considered significant aggravator in sentence for armed robbery).

Oldfield next asserts that the trial court erred by finding as an aggravating circumstance his "disdain for authority." Tr. at 605. Particularly, he argues that this factor is derivative of the aggravating factor of criminal history and, therefore, cannot properly be considered as a separate aggravating factor. Further, Oldfield maintains that

the court's use of this assessment as an aggravating circumstance violates his rights under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).[2]

Oldfield's argument is rendered moot to some extent by our conclusion that the trial court erred by using his criminal history as an aggravating circumstance. However, that leaves us to ponder whether a defendant's disdain for authority can stand alone as an aggravating circumstance in this post-*Blakely* era. *Blakely* applies and further explains the rule previously set forth in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). *Apprendi* requires that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Id*. at 2536. *Blakely* instructs that "[t]he relevant statutory maximum for *Apprendi* purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant." *Id*. at 2537. Thus, *Blakely*'s primary concern is not with what facts a judge uses to enhance a sentence, but with how those facts are found. *Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005).

Judicial statements that are characterized as aggravators are not always facts that need to be found beyond a reasonable doubt. *Haas v. State*, 849 N.E.2d 550, 553 (Ind. 2006). These statements are termed "moral-penal observations," which may serve as

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[2] Oldfield's sentencing hearing was held on September 25, 2006 and October 25, 2006. Oldfield filed his initial appellate brief on February 8, 2007, in which he included specific *Blakely* claims, thus fulfilling the requirements for appellate review on the merits of such claims. *See Kincaid v. State*, 837 N.E.2d 1008, 1010 (Ind. 2005) (holding that for cases in which appellant's initial brief was filed after date of decision in *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), specific *Blakely* claim must be made in appellant's initial brief on direct appeal for it to be reviewed on merits).

valid and separate aggravators provided they are (1) supported by facts found by a jury or otherwise admitted by the defendant, and (2) meant as a concise description of what the underlying facts demonstrate. *Id*.; *see also Morgan v. State*, 829 N.E.2d 12, 18 (Ind. 2005). Although *Blakely* removed the trial judge's authority to make factual determinations in sentencing, it left intact the judge's authority to make legal judgments in so far as determining whether facts alleged and found are sufficiently substantial and compelling to warrant imposing an enhanced sentence. *Morgan*, 829 N.E.2d at 17. Such moral-penal observations, therefore, do not violate *Blakely*. *Id*. at 18. It should be noted that such statements may not stand as separate aggravators when the factual basis that supports them also serves as an aggravator. *Haas*, 849 N.E.2d at 553.

Here, the trial court found Oldfield's "disdain for authority" to be an aggravating factor. This factor was based upon Oldfield's criminal history, particularly his probation violations. Appellant's App. at 793. Oldfield testified about his prior juvenile adjudication and probation violations at his sentencing hearing. Appellant's App. at 687-688 and 694-96. In addition, his criminal history was admitted as part of his pre-sentence investigation report, and Oldfield and his counsel both indicated to the court that there were no mistakes in the report. Appellant's App. at 636-37. Further, the court meant this aggravator to be a concise description of what Oldfield's criminal history demonstrates. The court stated that Oldfield's criminal history displayed a disdain for authority. Appellant's App. at 793. This aggravating factor satisfies the test as a moral-penal observation and may properly be used to support the enhancement of Oldfield's sentence without violating Oldfield's rights as articulated in *Blakely*. We note, however, that if

Oldfield's criminal history had been a proper aggravator, it could not have supported the aggravator of disdain for authority. *See Haas*, *supra*.

Next, we turn to Oldfield's contention that the trial court erred by finding as an aggravating factor that he brought a knife to the fight. Oldfield alleges that the testimony was conflicting regarding who brought the knife to the fight and that, because a deadly weapon is a material element of the offenses, it cannot also serve as an aggravating factor. For this aggravating factor as well, Oldfield avers that the trial court's finding violates his rights as outlined in *Blakely* because the court based his enhanced sentence upon this factor that was neither submitted to and determined by a jury nor admitted by him.

Because the *Blakely* issue is dispositive, we need not discuss Oldfield's other arguments on this issue. As we stated previously, with the exception of a defendant's prior convictions, any fact that is used to enhance a defendant's sentence must either be found by a jury beyond a reasonable doubt, admitted by the defendant, or, in the course of a guilty plea where the defendant has waived *Apprendi* rights, stipulated to by the defendant or found by judicial fact-finding upon consent of the defendant. *Trusley*, 829 N.E.2d at 925.

Here, there was no jury. Further, Oldfield did not admit that he brought the knives to the fight. On the contrary, he testified at the sentencing hearing that two people with whom he was riding obtained the knives from a separate car and put the knives into the car in which they all rode to the fight. Appellant's App. at 668-69 and 697. Oldfield testified that one of those two people then retrieved the knife from the car once they

arrived at their destination. Appellant's App. at 711. Although at least one of the three people with whom Oldfield shared a vehicle that night stated that Oldfield had obtained the knives from a separate vehicle and put them into the vehicle in which they were all riding, this witness statement does not satisfy the requirements of *Blakely*. Moreover, at sentencing the court found that "Mr. Oldfield, contrary to his testimony, took both knives with him to the fight." Appellant's App. at 792. However, Oldfield did not consent to any judicial fact-finding as part of his guilty plea. Thus, the court's finding of the aggravating factor that Oldfield brought knives to the fight amounts to a violation of his constitutional rights as set forth in *Blakely*.

The final aggravating circumstance found by the trial court is the severity of the victim's injuries. Oldfield asserts that this aggravator is inappropriate because there was "nothing particularly egregious" about these crimes. Appellant's Brief at 10. In addition, Oldfield raises a *Blakely* violation with regard to this aggravating circumstance.

We first note that Oldfield's convictions for battery with a deadly weapon require only a touching and do not require any proof of injury. Ind. Code § 35-42-2-1(a)(3) requires a knowing or intentional touching in a rude, insolent, or angry manner committed by means of a deadly weapon.

As we have stated previously, an aggravating circumstance is proper for *Blakely* purposes when it is: (1) a fact of prior conviction; (2) found by a jury beyond a reasonable doubt; (3) admitted to by the defendant; or (4) stipulated to by the defendant or found by a judge after the defendant consents to judicial fact-finding during the course of a guilty plea in which the defendant has waived his *Apprendi* rights. *See Trusley*,

supra. Obviously, this aggravating circumstance was neither a prior conviction nor found by a jury beyond a reasonable doubt. In addition, Oldfield did not waive his *Apprendi* rights at his guilty plea and stipulate to this fact or agree to judicial fact-finding regarding this fact. Therefore, we must determine whether this circumstance was supported by his own statements.

The factual basis for Oldfield's plea of guilty did not mention any injuries. Rather, Oldfield merely agreed to having committed battery with a deadly weapon, specifically a knife. Appellant's App. at 630. The severity of injuries aggravating factor likely originated from the sentencing hearing at which defense counsel asked Oldfield on cross-examination, "Are you aware of the extent of the injuries that, uh, Blake Eyler and Andrew Matthews suffered?" Oldfield responded, "Yes, I understand that they were very severe." Appellant's App. at 704. Thus, Oldfield specifically acknowledged the severity of the victims' injuries in this case. This admission by Oldfield, which serves as the basis for the aggravation of his sentences, does not violate *Blakely*.

We now turn to the mitigating circumstances that Oldfield maintains were supported by sufficient evidence in the record but which the court did not find. The first of these circumstances is actually a combination of two factors. Oldfield has lumped together the mitigating factors of victims of the crimes induced or facilitated the offenses and there exist substantial grounds tending to excuse or justify the offenses, though failing to establish a defense.

With respect to mitigating factors, it is within a trial court's discretion to determine both the existence and the weight of a significant mitigating circumstance.

Allen, 722 N.E.2d at 1251. Given this discretion, only when there is substantial evidence in the record of significant mitigating circumstances will we conclude that the sentencing court has abused its discretion by overlooking a mitigating circumstance. *Id*.

In the present case, the trial judge found three mitigating circumstances: (1) Oldfield's youth, (2) Oldfield's likeliness to respond to short-term imprisonment or probation, and (3) the fact that Oldfield acted under strong provocation. Appellant's App. at 605. With the third mitigating circumstance found by the trial court, it appears the court has already taken into account the fact that the victims facilitated the fight and/or provoked Oldfield in this incident. That is, the mitigating factor found by the court, as well as the commingled mitigator advanced by Oldfield, are all based upon the same circumstances. Review of the materials on appeal discloses that friends of Oldfield were arguing on the phone with victim Matthews, and a challenge was issued for a fight. Oldfield rode with his friends to the Eyler/Matthews apartment, where a group of people exited to fight Oldfield and his friend. Everyone agrees that Oldfield's partner was knocked out immediately by Eyler and that the victims, Eyler and Matthews, were both willing participants in the fight. It was at this point that Oldfield became involved in the altercation. Comments by the trial judge at sentencing make it clear that the judge took these events into account when determining Oldfield's sentence. The judge stated, "I think that [Oldfield and his friend] when they left [Oldfield's friend's] house were quite aware that they were going or very likely to be involved in a fight." "[Oldfield] ……..[u]ltimately suffered the, the worst of it and I think when it was over, he was angry and humiliated and he took the knives, a knife and did what he did." Appellant's App. at

792-93. Because the mitigating factor identified by the court was based upon the same circumstances as the two mitigators advanced by Oldfield on appeal, the court did not err in finding the single mitigating circumstance.

Oldfield also alleges that the court overlooked his remorse as a mitigating factor when it determined his sentence.[3] On appeal, a trial court's determination of a defendant's remorse is similar to its determination of credibility: without evidence of some impermissible consideration by the trial court, we accept its determination. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002).

At his sentencing hearing, Oldfield testified, "I couldn't be more sorry and show any more remorse towards [the victims]. I did not intend for that to happen that night. I wish I could relive the whole night and go back and change it all and never leave……" Appellant's App. at 689. In addition, in a letter to the trial court judge, Oldfield apologized for the pain he caused the victims and their families. Yet, the trial court is in the best position to judge the sincerity of a defendant's remorseful statements. Because we find no impermissible considerations in this case, we find no error.

As his second sentencing issue, Oldfield claims that the trial court erred when it ordered him to serve his sentences consecutively. Specifically, he avers that his conduct giving rise to both convictions of battery by means of a deadly weapon constitutes a single episode of criminal conduct such that they may not result in consecutive sentences.

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[3] The State argues that Oldfield has waived this issue because he did not argue remorse as a mitigating factor at sentencing. Although only briefly mentioned, Oldfield's counsel did mention Oldfield's remorse in his argument to the court at Oldfield's sentencing hearing. *See* Appellant's App. at 780. Therefore, we address the issue on the merits.

The version of Ind. Code § 35-50-1-2(c) that was in effect at the time Oldfield committed these offenses provided in pertinent part:

> The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Neither party claims that the instant offenses were "crimes of violence" as mentioned in Ind. Code § 35-50-1-2(c). Thus, the sole issue is whether the crimes of which Oldfield was found guilty constitute a single episode of criminal conduct.

An "episode of criminal conduct" is defined as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." Ind. Code § 35-50-1-2(b). Further, an "episode" has been defined as "an occurrence or connected series of occurrences and developments that may be viewed as distinctive and apart although part of a larger or more comprehensive series." *Cole v. State*, 850 N.E.2d 417, 419 (Ind. Ct. App. 2006). In addition, courts of this state have recognized that the singleness of a criminal episode should be based on whether the alleged conduct was so closely related in time, place, and circumstance that a complete account of one charge cannot be related without referring to details of the other charge. *Id*.

Oldfield was convicted of two counts of battery by means of a deadly weapon, as Class C felonies. At the time of Oldfield's offenses, the presumptive sentence for a Class B felony, the next higher class of felony, was ten years. *See* Ind. Code § 35-50-2-5. The trial court sentenced Oldfield to consecutive sentences of six years, with two years

suspended on each count. Thus, Oldfield's sentence, for purposes of this issue, is twelve years, two years more than the presumptive for the next higher class of felony.[4]

Oldfield's two battery convictions are based upon the same altercation that occurred on April 9, 2005. During the fight, he stabbed one victim and then attacked a second victim and stabbed him, as well. The entire incident, including both batteries, lasted only a few minutes and occurred at the same place (i.e., just outside the victims' apartment). Additionally, the batteries were based on the same circumstances. There were hostile phone calls between Oldfield's friend and one of the victims, which culminated in a challenge to fight. Oldfield and his friends drove to the victims' apartment and a brawl ensued in which Oldfield stabbed both victims. We therefore conclude that the actions underlying Oldfield's convictions were one episode of criminal conduct. *See Reed v. State*, 856 N.E.2d 1189, 1201 (Ind. 2006) (holding that two offenses of attempted murder where defendant fired shots at police officers, drove away and then fired additional shots were closely connected in time, place and circumstance to constitute a single episode of criminal conduct with the meaning of Ind. Code § 35-50-1-2(b)).

Thus, we are left with two valid aggravators and the three original mitigating factors. Moreover, we have concluded that the aggregate length of the consecutive

[4] For purposes of this issue, we include any period of suspended sentence in calculating the total length of the sentence. *See Mask v. State*, 829 N.E.2d 932, 936 (Ind. 2005) (holding that any period of suspended sentence must be included when calculating maximum aggregate sentence under Ind. Code § 35-50-1-2(c)).

sentences in this case violates Ind. Code § 35-50-1-2(c). Therefore, we reverse and remand to the trial court for resentencing consistent with this opinion.

Apparently as an afterthought, Oldfield mentions the inappropriateness of his sentence in the concluding paragraph of his brief. However, given our reversal on the merits of the sentencing determination, we need not reach the Appellate Rule 7(B) appropriateness question.

Reversed and remanded for resentencing consistent with this opinion.

RILEY, J., and BAILEY, J., concur.